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Mavronicola, Natasa

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Inhuman and degrading punishment, dignity, and the limits of retribution

human rights – ECHR – penology – inhuman and degrading punishment – life imprisonment without parole

Natasa Mavronicola*

Abstract

The recent judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in *Vinter and others v United Kingdom* provides a much needed clarification of the parameters of the prohibition on inhuman and degrading punishment under Article 3 of the European Convention on Human Rights (ECHR) as it applies to whole life orders of imprisonment under mandatory life sentences – essentially, life imprisonment without parole. The Grand Chamber’s judgment refines Strasbourg doctrine on life imprisonment and the prospect of release and illuminates key principles concerning inhuman and degrading punishment under Article 3 of the ECHR. This article considers the judgment’s profound significance in relation to both human rights and penology.

INTRODUCTION

The recent judgment of the Grand Chamber in *Vinter and others v United Kingdom*¹ has been met with criticism from senior members of the UK government and some media-fuelled public ire, portrayed by some as yet another example of the European Court of Human Rights (ECtHR) dictating criminal justice principles in England and Wales contrary to the popular will.² In this comment, I argue that it embodies a ground-breaking decision on the parameters

*Lecturer in Law, Queen’s University Belfast, United Kingdom (n.mavronicola@qub.ac.uk). The author would like to thank Jonathan Bild, Alan Greene, Nicola Padfield and the anonymous referee for their insightful and extremely valuable comments on an earlier draft. Special thanks are also due to Professor David Feldman for his invaluable guidance on my writings on Article 3 of the ECHR. The analysis is current to the best of my knowledge as of 17 July 2013. All errors are, of course, my own.

¹ *Vinter and others v United Kingdom* App Nos 66069/09, 130/10 and 3896/10, Grand Chamber Judgment of 9 July 2013, hereafter, *Vinter* [GC].

² For the government’s reaction, see N. Watt and A. Travis, ‘Tory ministers condemn ECHR ruling on whole-life prison sentences’, *The Guardian*, 9 July 2013, available at <http://www.guardian.co.uk/law/2013/jul/09/whole-life-sentences-david-cameron-human-rights> (last visited 17 July 2013); for the media take see, for instance, G. Wilson, ‘Victory for Evil’, *The Sun*, 10 July 2013, available at <http://www.thesun.co.uk/sol/homepage/news/politics/5005765/Victory-for-evil-as-EU-judges-declare-that-whole-life-sentences-are-inhumane.html> (last visited 17 July 2013); N. Tebbit, ‘Time to leave the European Court for Criminal Privileges’, *The Telegraph*, 10 July 2013, available at <http://blogs.telegraph.co.uk/news/normantebbit/100225858/time-to-leave-the-european-court-for-criminal-privileges/> (last visited 16 July 2013); but cf M. Riddell, ‘Why the European Court is right on whole-life sentences’, *The Telegraph*, 9 July 2013, available at <http://blogs.telegraph.co.uk/news/maryriddell/100225661/why-the-european-court-is-right-on-whole-life-sentences/> (last visited 17 July 2013). The case has already been the subject of – generally positive – academic coverage on various blogs. See, for instance, N. Holcroft-Emmess, ‘Vinter v UK – Why The Majority Are Right To Find That Whole Life Orders Violate Article 3 ECHR’, Oxford Human Rights Hub Blog, 12 July 2013, available at <http://ohrh.law.ox.ac.uk/?p=2247> (last visited 17 July 2013); D. Bunting, ‘Whole Life tariffs unlawful – Vinter v UK in the ECHR’, UK Criminal Law Blog, 11 July 2013, available at <http://ukcrime.wordpress.com/2013/07/11/whole-life-tariffs-unlawful-vinter-v-uk-in-the-echr/> (last visited 17 July 2013).

of the absolute prohibition on inhuman and degrading punishment under Article 3 of the European Convention on Human Rights (ECHR), but one which is also faithful to previous ECtHR case law and the underlying values encompassed in the prohibition and the Convention itself. The judgment clarifies Strasbourg doctrine on life imprisonment without the possibility of parole and casts light on key principles underpinning the notions of inhuman and degrading punishment under Article 3. It carries important implications for penology and human rights although, as I indicate below, the full extent of its implications remains undefined.

In the analysis below, I set out the facts and legal background to the case at issue and run through the Court's judgment on the merits. I proceed to demonstrate that the Grand Chamber in *Vinter* not only imposes a procedural duty of review of whole life sentences but also establishes a principle of reducibility based on a rejection of 'pure' punishment – wording used by the UK government and the ECtHR, and carrying the meaning of 'retribution' – as a legitimate penological ground for imprisoning an individual for life. The rejection of 'pure' punishment in this context and the emphasis on prisoner rehabilitation in the Court's reasoning impact on penology as it relates to the absolute right enshrined in Article 3 of the ECHR and to the value of human dignity, which the Court portrays as underpinning not only Article 3 but the Convention more broadly.

BACKGROUND

The law in England and Wales imposes the mandatory sentence of life imprisonment on those convicted of murder.³ As the law currently stands, upon an individual's conviction for murder, which automatically triggers the mandatory sentence of life imprisonment, the trial judge is required to set a minimum term of imprisonment, which must be served by the individual convicted for the purposes of punishment and retribution before consideration for parole. Trial judges have been responsible for setting this minimum period of imprisonment since the Home Secretary's role in setting the 'tariff' period was removed by the Criminal Justice Act 2003 after a series of judicial decisions on the right to a fair trial.⁴

The principles which guide the trial judge's assessment of the appropriate minimum term are set out in Schedule 21 to the Criminal Justice Act 2003. A 'whole life order' may be imposed by the trial judge instead of a finite minimum term if the judge considers the seriousness of the offence to be exceptionally high, applying the principles in Schedule 21. If the whole life order has been imposed on conviction, the prisoner cannot be released other than at the discretion of the Secretary of State under section 30(1) of the Crime (Sentences) Act 1997. The Secretary of State's criteria for the exercise of that discretion are set out in Prison Service Order 4700, chapter 12, and comprise a cumulative set of requirements carving out very narrow circumstances which allow for compassionate release in cases of terminal illness or severe incapacitation. Under the statutory system which subsisted in England and Wales prior to the alterations brought about by the Criminal Justice Act 2003, a review of the need for a whole life order took place after the prisoner had served 25 years of his or her sentence. This review mechanism was not included in the 2003 Act.

³ See Murder (Abolition of Death Penalty) Act 1965, s 1.

⁴ See *Stafford v United Kingdom* App No 46295/99, Judgment of 28 May 2002; *Benjamin v United Kingdom* App No 28212/95, Judgment of 26 September 2002; and *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46.

The three applicants were Douglas Gary Vinter, Jeremy Neville Bamber and Peter Howard Moore. They had all received mandatory life sentences upon conviction for murder, and had whole life orders imposed upon them. A whole life order had been imposed by the trial judge in the case of Vinter under the provisions in Schedule 21 of the Criminal Justice Act 2003, whilst Bamber's and Moore's whole life orders had originally been imposed by the Secretary of State and were then confirmed by the High Court on their application for review under section 276 and Schedule 22 of the Criminal Justice Act 2003, which cover such transitional cases.

Schedule 21 of the Criminal Justice Act 2003 provides four different 'starting points' in the judicial assessment of the minimum term of imprisonment under a mandatory life sentence faced by a person whose crime was committed when he or she was over 18,⁵ which represent the baseline from which aggravating and mitigating factors can operate to adjust the order made by the judge. These 'starting points' are: a whole life order, a minimum term of 30 years imprisonment, a minimum term of 25 years' imprisonment, and a minimum term of 15 years imprisonment. Whole life orders will be the starting point in cases where the seriousness of the offence is 'exceptionally high' (paragraph 4(1) of Schedule 21). These would include: cases involving the commission of murder by an offender previously convicted of murder (paragraph 4(2)(d)), as was the case in relation to Vinter; cases involving the murder of two or more persons with substantial premeditation or planning (paragraph 4(2)(a)(i)), as was the case in relation to Bamber; and the murder of two or more people where each murder involved sexual or sadistic conduct (paragraph 4(2)(a)(iii)), as was the case in relation to Moore. The appeals lodged by the three applicants to the Court of Appeal were all dismissed, as the Court of Appeal found all whole life orders fully justified.⁶

The applicants brought their cases to the ECtHR arguing that their prison sentences were in breach of Article 3 of the ECHR.⁷ The Chamber (Fourth Section) of the ECtHR, in a judgment on 17 January 2012,⁸ considered previous case law on the subject and found that an Article 3 issue would only arise if the applicants could show both that their sentences to life imprisonment were irreducible *de facto* and *de jure* and that their continued imprisonment could no longer be justified on legitimate penological grounds, which, according to the Court, encompassed punishment,⁹ deterrence, public protection and rehabilitation.¹⁰ According to the Chamber, none of the applicants could show these two cumulative conditions. In particular, they could not show that their continued imprisonment was no longer justified on any penological grounds, with the Fourth Section of the ECtHR finding that their continued incarceration served the purposes of 'punishment and deterrence'.¹¹

⁵ The starting points were formerly – and at the time relevant to the applicants – three, but a change occurred in 2010 to insert para 5A into Schedule 21, under The Criminal Justice Act 2003 (Mandatory Life Sentence: Determination of Minimum Term) Order 2010 (S.I. 2010/197).

⁶ See *R v Vinter* [2009] EWCA Crim 1399; *R v Bamber* [2009] EWCA Crim 962; *R v Moore* [2009] EWCA Crim 555.

⁷ A complaint under Article 5(4) of the ECHR was declared inadmissible by the Chamber in its consideration of the case and was held to fall outside the scope of the case before the Grand Chamber: *Vinter* [GC], n 1 above, para 132.

⁸ *Vinter and others v United Kingdom* App Nos 66069/09, 130/10 and 3896/10, Judgment of 17 January 2012, hereafter, *Vinter* [Fourth Section].

⁹ As stated above, presumably the Court uses the word 'punishment' to mean 'retribution'.

¹⁰ *Vinter* [Fourth Section], n 8 above, para 92.

¹¹ *ibid* para 95.

In the Grand Chamber, the government argued – *inter alia* – that the Chamber’s judgment indicated that neither a life sentence without parole nor the serving of such a sentence was in principle incompatible with Article 3. It argued in clear terms that the penal policy on whole life terms of imprisonment without parole reflected the view of domestic authorities and Parliament ‘that there were some crimes so grave that they were deserving of lifelong incarceration for the purposes of *pure punishment*’.¹² Indeed, the government emphasised that the ‘deserved’ sentence had been either imposed or affirmed by a court of law, which had taken into account all mitigating and aggravating factors.¹³ It therefore argued that a review mechanism would only offer ‘a tenuous hope of release’, given that ‘a whole life order was imposed *to punish the offender for the exceptional gravity of his or her crime*, and the gravity of that crime remained constant over time’.¹⁴ The government further submitted that a whole life order was not an irreducible life sentence as the Secretary of State’s power to order release was ‘wide and non-prescriptive’ and would have to be exercised compatibly with the Convention. Thus, according to the government, if the applicants ever sought to contend that their continued detention was not justified on any penological grounds, section 30 of the Crime (Sentences) Act would enable them to be released; any decision by the Secretary of State to the contrary would be amenable to judicial review.¹⁵

In the Grand Chamber, the applicants argued that the Chamber had erred in finding that an Article 3 issue did not arise until such a time as there ceased to be legitimate penological grounds to justify continued incarceration, suggesting that the Chamber missed two issues: first, the substantive issue that whole life orders amounted to the proscribed ill-treatment *ab initio*; secondly, the need for a review to be built into a whole life sentence to avert a breach of Article 3.¹⁶

With regard to the first issue, the applicants accepted that a life prisoner could spend the rest of his or her life in detention insofar as he or she remained a risk to the community, and that this would not amount to a breach of Article 3. However, in the applicants’ submission, as summarised by the Grand Chamber, ‘a whole life order which was imposed purely for the purposes of punishment directly undermined human dignity, destroyed the human spirit and ignored the capacity for countervailing justifications for conditional release which could arise in the future’.¹⁷ They further suggested that the justifications for imprisonment, which were punishment, deterrence, public protection, and rehabilitation, formed a balance of factors which could change over time. According to the applicants, an unreviewable whole life order entailed incarceration until death irrespective of changes in these factors which might occur in the course of serving the sentence. The applicants further argued that a whole life order was fundamentally at odds with the principle of reintegration which dominated European penal policy, alluding to Council of Europe documents, CPT documents, and Contracting States’ law and practice.¹⁸

As to the requirement of a review of a whole life order, the applicants submitted that the UK government had offered no principled reason for the failure to include a 25 year review in the

¹² *Vinter* [GC], n 1 above, para 92 (emphasis added).

¹³ *ibid* para 95.

¹⁴ *ibid* para 93 (emphasis added).

¹⁵ *ibid* para 94.

¹⁶ *ibid* para 98.

¹⁷ *ibid* para 99.

¹⁸ *ibid*.

2003 Act, even though such review subsisted prior to the Act.¹⁹ Moreover, they suggested that their sentences were irreducible in fact, as no whole life prisoner had ever been released under section 30 of the 1997 Act or any other power.²⁰

JUDGMENT

On the basis that the applicants were not arguing that their whole life orders were grossly disproportionate, the Grand Chamber sought to examine whether they breached Article 3 ‘on other grounds’.²¹ It proceeded to outline the general principles guiding this examination.

It began by stating the rather circular principle that the criminal justice and penal system of a Contracting State ‘is in principle outside the scope of the supervision the Court carries out at the European level, provided that the system does not contravene the principles set forth in the Convention’.²² It alluded to a margin of appreciation allowed to Contracting States in deciding the appropriate length of imprisonment for different crimes, as this issue was the subject of ‘rational debate’.²³ Thus, according to the Court, the imposition of a life sentence on adult offenders for particularly grave crimes is not in itself incompatible with Article 3 or any other Convention Article.²⁴

Nonetheless, as the Court swiftly noted, the imposition of an irreducible life sentence on an adult may raise an issue under Article 3, a principle – based on *Kafkaris*²⁵ – which compelled the Court to emphasise and reaffirm two fundamentals:

First, a life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible... [T]he Court would emphasise that no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she *continued to pose a danger to society*... Indeed, preventing a criminal from re-offending is one of the “essential functions” of a prison sentence...

Second, in determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. Where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3.²⁶

The Court proceeded by outlining the legitimate penological grounds for detention, which in the Court’s view ‘will include punishment, deterrence, public protection and rehabilitation’.²⁷

¹⁹ *ibid* para 100.

²⁰ *ibid* para 97.

²¹ *ibid* para 103.

²² *ibid* para 104. See also *Kafkaris v Cyprus* App No 21906/04, Grand Chamber Judgment of 12 February 2008, para 99.

²³ *Vinter* [GC], n 1 above, para 105. See further *T v United Kingdom* App No 24724/94, Grand Chamber Judgment of 16 December 1999, para 117; *V v United Kingdom* App No 24888/94, Grand Chamber Judgment of 16 December 1999, para 118.

²⁴ *Vinter* [GC], n 1 above, para 106. See also *Kafkaris*, n 22 above, para 97.

²⁵ *Kafkaris*, n 22 above.

²⁶ *Vinter* [GC], n 1 above, paras 108-109 (emphasis added). The Court cited *Kafkaris*, n 22 above, para 98.

²⁷ *Vinter* [GC], n 1 above, para 111.

Almost brushing aside the clear submission of the UK government that a whole life order may be imposed for the purposes of ‘pure punishment’,²⁸ the Court then posited:

[A]ny of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.²⁹

The Grand Chamber proceeded to criticise the fact that the denial of a prospect of release and of a possibility of review faced by a prisoner under a whole life order entailed ‘a risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable’.³⁰ This is a clear rejection of purely retributive whole life sentences, based primarily on the penological principle of rehabilitation, which is eliminated by such sentences.

The Court briefly made allusion to an argument that goes back to proportionality, a principle it originally appeared to dismiss as inapplicable to the case,³¹ by suggesting that, under a whole life sentence, ‘the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence’ and paraphrasing Lord Justice Laws’ argument from *Wellington* that, even if a life sentence appears appropriate at the time of imposition, ‘with the passage of time it becomes...a poor guarantee of just and proportionate punishment’.³² The idea is that, depending on the life span of the individual, the punishment is *ex ante* of indeterminate length and may ultimately reach such length of time as to be disproportionate. The Court did not pursue this point much further however.

Instead, the Grand Chamber referred with approval to the German Federal Constitutional Court’s (FCC) finding in the *Life Imprisonment Case* that it would be incompatible with human dignity for a person to be deprived of freedom without any chance to regain it someday, a principle that also led the FCC to establish, through the constitutional right to dignity, the principle of rehabilitation firmly into the German penological system.³³ For the FCC, this meant truly enabling the prospect of rehabilitation and reintegration into society – the prospect of compassionate release only for the infirm or terminally ill was not sufficient.³⁴ The FCC’s take was of substantial persuasive value according to the Grand Chamber – as the Grand Chamber put it, ‘[s]imilar considerations must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity’.³⁵ It concluded its analysis by referring to European and international law, which, in the Court’s view, offered clear support for the idea that all prisoners, including those under life sentences,

²⁸ See n 12 above.

²⁹ *Vinter* [GC], n 1 above, para 111.

³⁰ *ibid* para 112.

³¹ See n 21 above.

³² *R v Wellington* [2007] EWHC 1109 (Admin), [39].

³³ BVerfGE 45, 187; *Vinter* [GC], n 1 above, para 113.

³⁴ *ibid*. Lazarus elaborates on the ‘constitutional resocialisation principle’ in L. Lazarus, ‘Conceptions of Liberty Deprivation’ (2006) 69 MLR 738, 746-752.

³⁵ *Vinter* [GC], n 1 above, para 113.

should be offered the possibility of rehabilitation and the possibility of release if they are rehabilitated, noting that ‘while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment’.³⁶

This led the Grand Chamber to some general conclusions. It found that, in the context of life sentences, Article 3 must be interpreted as requiring reducibility via review by the domestic authorities, which must consider whether changes in the prisoner, particularly towards rehabilitation, have occurred so as to mean ‘that continued detention can no longer be justified on legitimate penological grounds’.³⁷ After allusion to the margin of appreciation and the principle that the Court cannot prescribe the method and timing of review, the Court observed, with clear normative overtones, that ‘the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter’.³⁸ According to the Grand Chamber, ‘where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention’.³⁹

The Court then addressed the issue of timing. It stated that, although review may take place quite a significant length of time subsequent to the imposition of a whole life sentence, whole life prisoners should not be obliged to wait for an indeterminate period before raising the complaint as to the lack of a review offering a prospect of release, as this would – *inter alia* – offend legal certainty. The Court pointed out that it makes little sense to expect a prisoner under a whole life order to work towards rehabilitation without knowing whether and when he would ultimately be entitled to be considered for release. Thus, according to the Court, a breach of Article 3 arises at the moment of imposition of the whole life sentence if it is imposed without a mechanism for review.⁴⁰

The Grand Chamber then applied its principles to the case at hand. It remained unconvinced by the UK government’s reasons for removing the 25 year review possibility, notably the argument that the Criminal Justice Act 2003 sought to judicialise decisions on minimum terms of imprisonment for those facing a mandatory life sentence. It considered that ‘the need for independent judges to determine whether a whole life order may be imposed is quite separate from the need for such whole life orders to be reviewed at a later stage so as to

³⁶ *ibid* paras 114-118. The Court here referred to a variety of documents on which it elaborated in earlier paragraphs (paras 60-64, 76), including Committee of Ministers Resolution 76(2) of 17 February 1976, Council of Europe; Committee of Ministers Recommendation 2003(23) (on the management by prison administrations of life sentence and other long-term prisoners) of 9 October 2003, Council of Europe; Committee of Ministers, Recommendation 2003(22) (on conditional release) of 24 September 2003, Council of Europe; J. Worsaae Rasmussen (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment), *Memorandum on Actual/Real Life Sentences*, 27 June 2007, Council of Europe; Article 5(2) of the Framework Decision of the Council of the European Union of 13 June 2002 on the European arrest warrant. It also referred to the practice on life imprisonment in Contracting States (paras 68-72) and beyond (paras 73-75).

³⁷ *ibid* para 119.

³⁸ *ibid* para 120.

³⁹ *ibid* para 121. It is not clear whether the phrase ‘such a review’ means after a maximum of 25 years: this appears to be left open by the Court.

⁴⁰ *ibid* para 122. In a video commentary on the judgment, Nicola Padfield highlighted this paragraph as lying at the centre of the Court’s analysis: see N. Padfield, ‘Law in Focus: *Vinter v UK* – the right to hope and the whole life tariff’, 17 July 2013, available at <http://www.law.cam.ac.uk/press/news/2013/07/law-in-focus-vinter-v-uk--the-right-to-hope-and-the-whole-life-tariff--nicola-padfield/2291> (last visited 17 July 2013).

ensure that they remain justified on legitimate penological grounds'.⁴¹ It is clear from this statement that the Court essentially did not accept the government's argument that the whole life term was the *minimum* term imposed for purely retributive purposes – it indicates rather that, in the Court's view, the retributive aspect of the sentence at some point effectively 'runs out' – or must run out.

Moreover, the Grand Chamber was not persuaded that the Secretary of State's power under section 30 of the Crimes (Sentences) Act 1997 created a meaningful prospect of release. In essence, the Court was not convinced of the *de jure* and *de facto* reducibility of the whole life terms imposed on the applicants. It did not find that a sufficient degree of certainty existed as to the substantive or procedural contours of their prospects of release, particularly given the restrictive subsisting policy published by the Secretary of State.⁴² The Court clarified that 'compassionate release of this kind was not what was meant by a "prospect of release" in *Kafkaris*'.⁴³ The Grand Chamber reflected on the Court of Appeal's reasoning in *Bieber*,⁴⁴ in which the UK Court of Appeal acknowledged that the restrictive policy of the Secretary of State raised an Article 3 issue. The Court of Appeal had suggested that the issue could be addressed by the Secretary of State applying his power, in an Article 3-compatible manner, to release anyone whose imprisonment could no longer be justified on any legitimate penological ground (at the point when it could no longer be so justified).⁴⁵ Yet the Grand Chamber was not convinced that the possibility, based on the Court of Appeal's reasoning, that either the Secretary of State or domestic courts reviewing the Secretary of State's decision would adopt an ECHR-compatible interpretation of section 30 of the 1997 Act reflected the prospect of release required under Article 3, given the restrictive terms of Prison Service Order 4700.⁴⁶

Given the lack of a real, clear, prospect of release and the absence of a 'dedicated review mechanism', the Court considered that, as things stood, the applicants' life sentences could not be regarded as reducible for the purposes of Article 3 of the ECHR and thus there was a breach of Article 3.⁴⁷ Yet it sought to clarify that this finding did not mean that there were no longer any legitimate penological grounds for the *applicants*' detention, and that the finding of a violation could not be understood as giving them the prospect of imminent release.⁴⁸ The Grand Chamber did not award any compensation for non-pecuniary damage, as it considered that the finding of violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained.

In separate opinions, Judges Ziemele, Power-Forde, and Mahoney zoomed in on points that they wished to address further. Judge Ziemele, who voted with the majority, criticised the Court's wording that 'the finding of violation constitutes sufficient just satisfaction' and argued that, if the Court considers that the compensation sought is unjustified and thus decides not to award it, the Court should state this clearly and explain it. Judge Power-Forde, who voted with the majority, explained that what swayed the substantive decision for her was

⁴¹ *ibid* para 124.

⁴² *ibid* paras 125-126.

⁴³ *ibid* para 127.

⁴⁴ *R v Bieber* [2008] EWCA Crim 1601.

⁴⁵ *ibid* [48]. See *Vinter* [GC], n 1 above, paras 47-49.

⁴⁶ *Vinter* [GC], n 1 above, paras 128-129.

⁴⁷ *ibid* para 130.

⁴⁸ *ibid* para 131.

the ‘right to hope’: she argued that, though the applicants may ultimately remain in prison for the duration of their lives, they ought to retain the right to hope that someday they may have atoned for their wrongs. In her view, leaving them no such hope would be degrading.

Judge Mahoney sought to clarify two elements of the judgment: the aspect of timing, and the reducibility requirement under Article 3 of the ECHR. He pointed out that an important aspect of the judgment concerned the timing at which the applicants could claim a breach of Article 3: in essence, the Grand Chamber had found that they could do so *before* their imprisonment reached a point when it could no longer be justified on any penological grounds (a substantive breach of Article 3 according to Judge Mahoney), if they could show a lack of reducibility (a breach of a procedural requirement of Article 3 according to Judge Mahoney). Judge Mahoney explained that this preventive application of Article 3 was nothing new, noting the extradition case of *Soering v United Kingdom* as the first example of such an approach by the ECtHR.⁴⁹ Judge Mahoney then sought to rationalise the reducibility requirement as a pre-existing aspect of the case law, notably *Kafkaris*. He suggested that it was the timing at which the applicants could claim a breach of Article 3, due to a lack of reducibility, which was the main development made by the Grand Chamber in *Vinter*.

In the only dissenting opinion, Judge Villiger argued that the Grand Chamber was unduly departing from its ‘default’ individualised, concrete, *ex post facto* assessment in Article 3 cases, whereby all relevant circumstances are considered before concluding on whether the Article 3 threshold of inhuman or degrading treatment or punishment has been crossed. He suggested that such an approach did not ‘square easily with the principle of subsidiarity underlying the Convention’, not least on a matter which attracts significant disagreement. Judge Villiger argued that the Grand Chamber’s manner of analysing Article 3 – in an abstract, *ex ante*, non-individualised way – did not appropriately reflect Article 3’s ‘cardinal importance’ within the ECHR. Judge Villiger also pointed out that the Grand Chamber had not explained whether the irreducible whole life sentences amounted to inhuman or degrading punishment (or torture), and suggested that, if the applicants’ cases were considered at this point in time, none of them could be viewed as subjected to inhuman or degrading punishment.

SIGNIFICANCE

The judgment of the Grand Chamber in *Vinter* carries considerable significance for human rights and penology. It represents the culmination of the Court’s jurisprudence on the compatibility of whole life imprisonment of adults with the right not to be subjected to inhuman or degrading treatment or punishment.⁵⁰ Article 3 of the ECHR is considered to proscribe such treatment and punishment ‘in absolute terms’, a point highlighted by the Court in a number of cases.⁵¹ Thus, the interpretation of the terms ‘inhuman’ and ‘degrading’ in relation to treatment or punishment inflicted upon individuals is of decisive importance: once

⁴⁹ *Soering v United Kingdom* App No 14038/88, Judgment of 7 July 1989.

⁵⁰ Note that ECtHR cases concerning life sentences imposed on persons under the age of 18 have set up strict requirements regarding prospects of release, review mechanisms, and minimum terms, based not only on Article 3 but also – and predominantly – on Article 5 of the ECHR. See, for instance, *Weeks v United Kingdom* App No 9787/82, Judgment of 2 March 1987, *Hussain v United Kingdom* App No 21928/93, Judgment of 21 February 1996; *T v United Kingdom* App No 24724/94, Judgment of 16 December 1999.

⁵¹ See for instance *Ireland v United Kingdom* App No 5310/71, Judgment of 18 January 1978, para 163; *Chahal v United Kingdom* App No 22414/93, Grand Chamber Judgment of 15 November 1996, para 79.

a treatment or punishment falls within such interpretation, it is absolutely prohibited and no external consequentialist reasoning provided by the government can justify it.⁵²

The most important case in which the Court dealt with the compatibility of whole life imprisonment with Article 3 before *Vinter* has been *Kafkaris v Cyprus*.⁵³ In *Kafkaris*, the Grand Chamber of the ECtHR established the requirement of *de jure* and *de facto* reducibility.⁵⁴ This did not mean that a life sentence *must* be reduced, but that it must be *capable* of being reduced: as a matter of law and as a matter of fact. Despite the system for Presidential pardon in Cyprus being problematic both as a matter of law and as a matter of fact – there were severe rule of law concerns regarding its application, which was not only uncertain but also rare – the Court found that *Kafkaris*' life sentence *was* reducible *de jure* and *de facto*.⁵⁵ It did not seek to set up any strict criteria concerning a review mechanism or to clarify the contours of a meaningful prospect of release, finding that there was significant disagreement on the subject amongst Contracting States.⁵⁶

In the segments from *Vinter* quoted above, the Grand Chamber made certain important remarks concerning the reducibility requirement, the need for a review mechanism, and the fluctuation of legitimate penological grounds in the course of a sentence of life imprisonment. There are four elements of considerable significance in the judgment.

First, the Court clarified the proper interpretation of *Kafkaris* on reducibility, after it was arguably misinterpreted by the Fourth Section of the Court in *Harkins and Edwards v United Kingdom*,⁵⁷ *Babar Ahmad v United Kingdom*,⁵⁸ and the first instance *Vinter* judgment itself (all decided by the Fourth Section of the ECtHR).⁵⁹ In particular, the misinterpretation given to *Kafkaris* was that a whole life sentence of imprisonment, whether it is a mandatory or discretionary one, would only raise an issue under Article 3 'when it can be shown: (i) that the applicant's continued imprisonment can no longer be justified on any legitimate penological grounds (such as punishment, deterrence, public protection or rehabilitation); and (ii) as the Grand Chamber stated in *Kafkaris*...the sentence is irreducible *de facto* and *de jure*'.⁶⁰

In fact, the Grand Chamber in *Kafkaris* had stipulated that what is necessary to comply with Article 3 is 'that a life sentence is *de jure* and *de facto* reducible'.⁶¹ The difference is significant, though couched in the subtleties of grammatical construction. *Kafkaris* established a requirement of reducibility: that a whole life sentence must be *both de jure and de facto* reducible to avoid breaching Article 3. The subsequent cases quoted above sought to

⁵² N. Mavronicola, 'What is an "absolute right"? Deciphering absoluteness in the context of Article 3 of the European Convention on Human Rights' (2012) 12 *Human Rights Law Review* 723.

⁵³ See n 22 above and several references to *Kafkaris* by the Grand Chamber in *Vinter* [GC], n 1 above.

⁵⁴ *Kafkaris*, n 22 above, para 98.

⁵⁵ *ibid* para 103.

⁵⁶ *Kafkaris*, n 22 above, para 104.

⁵⁷ *Harkins and Edwards v United Kingdom* App Nos 9146/07 and 32650/07, Judgment of 17 January 2012.

⁵⁸ *Babar Ahmad and others v United Kingdom* App Nos 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, Judgment of 10 April 2012.

⁵⁹ *Vinter* [Fourth Section], n 8 above.

⁶⁰ *Harkins and Edwards v United Kingdom*, n 58 above, para 137; *Babar Ahmad and others v United Kingdom*, n 58 above, para 242; *Vinter* [Fourth Section], n 8 above, para 92. This interpretation was based on UK court judgments, in particular *R v Bieber*, n 44 above, and *R v Wellington*, n 32 above.

⁶¹ *Kafkaris v Cyprus*, n 22 above, para 98.

recast this into a requirement of irreducibility *in order* for a whole life sentence to raise an issue under Article 3: ie that a whole life sentence must be both *de jure* and *de facto* irreducible to offend Article 3. Thus, whilst either *de facto* or *de jure* irreducibility would clearly offend the reducibility requirement in *Kafkaris*, the subsequent cases constructed a higher threshold whereby it must be *both* in order to offend the reducibility requirement. The Court reaffirmed that the requirement is one of *de jure* as well as *de facto* reducibility. This is a point of great significance that is missing in Judge Mahoney's analysis, which appeared to equate the Fourth Section's analysis with the Grand Chamber's analysis in *Vinter*.⁶²

Secondly, the Court's choice of emphasis on dangerousness, in its statement that 'no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she *continued to pose a danger to society*'⁶³ reflects a very sharp perspective on whole life terms of imprisonment. It is no accident at all that the Court refers to the dangerousness of the incarcerated individual (and to the State's need to protect the public from further potential criminal action of such individuals) as the key reason they may ultimately in fact be kept in prison for life. It is a clear indication that the Court, in contrast with the UK government,⁶⁴ does not accept that the retributive (and deterrent) purpose of imprisonment can in itself justify whole life imprisonment.

The Grand Chamber cemented this position by making numerous references to international treaties, Council of Europe documents, and European Court judgments which stipulate that prisoners should be given the possibility to atone for their crimes within their lifetime, the possibility to attain rehabilitation and enjoy a prospect of release if they achieve it (and thus no longer pose a threat to the public). The emphasis on rehabilitation – another legitimate penological ground, in the Court's reasoning – does not simply adjust the balance of penological grounds during the course of imprisonment, as the Court puts it somewhat misleadingly.⁶⁵ It refutes the possibility of Article 3-compatible purely retributive whole life terms of imprisonment. Instead, the Court's choice of emphasis suggests that there must be a finite punitive term, with further imprisonment being premised on the need for public protection if the individual remains dangerous. This is highly significant. The minimum term (formerly known as tariff) in English criminal law embodies the retributive term of imprisonment.⁶⁶ The minimum term of *life* imprisonment, found in the Criminal Justice Act 2003, is no longer to be seen as Article 3-compatible. Indeed, the indicative term of 25 years provided by the Court may suggest that even the 30 year minimum terms should be reconsidered. Beyond England and Wales, this sends a message to many other Contracting States and, as I argue below, to non-ECHR States also.

Thirdly, the Grand Chamber judgment clearly establishes the procedural requirement of review. This entails that not only must there be a prospect of release (though not, certainly, a guarantee of release), as established in *Kafkaris*, there must also be a procedure set up allowing prisoners to be considered for release at a certain point in time. The Court had been

⁶² *Vinter* [GC], n 1 above, concurring opinion of Judge Mahoney, para 12.

⁶³ *ibid* para 108; n 26 above.

⁶⁴ See UK government's arguments, n 12, n 13 and n 14 above.

⁶⁵ *Vinter* [GC], n 1 above, para 111.

⁶⁶ This was clear in the UK government's arguments in *ibid*. See also the historical analysis in S. Shute, 'Punishing murderers: release procedures and the "tariff", 1953-2004' (2004) (Nov) Crim LR 873. For wider analysis of tariff and release systems (noting that it is an area of fast-paced change) in the UK, see N. Padfield, *Beyond the Tariff: Human rights and the release of life sentence prisoners* (Devon: Willan Publishing, 2002).

hesitant to establish a clear review requirement in *Kafkaris*, noting a lack of agreement between States on the subject as well as the reforms the Cypriot government was putting in place.⁶⁷ The affirmation of this procedural requirement by the Grand Chamber in *Vinter* cemented the idea that ‘for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review’.⁶⁸ Nonetheless, the Grand Chamber left the particulars of the mechanism open to Contracting States. Notwithstanding this, if the review mechanism and prospect of release are lacking, the life sentence will be in breach of Article 3 as of its imposition – an important matter of timing, as outlined above. Indeed, with this implication in mind, the significance of the review requirement is not just procedural. It is indelibly tied to the need for prisoners to have a realistic prospect of eventual release – in other words, *hope* – from the beginning of their imprisonment, so as to accord them the minimum level of respect substantively required by the prohibition on inhuman and degrading treatment and punishment under Article 3.

Extrapolating from this, it may well be that the indicative term of 25 years prior to review may have to be adjusted in relation to older prisoners facing pre-parole terms – either under life imprisonment or under other sentences – which are likely to last longer than their foreseeable lifetime. This point is not explicit in the Grand Chamber’s reasoning, but appears to be a plausible inference.⁶⁹ A more flexible approach would thus have to be taken by the authorities towards ensuring that the retributive term is likely to be finite, so as to allow for a ‘window’ of possibility for release within the prisoner’s lifetime, subject to public protection concerns.

Fourthly, despite making passing reference to the margin of appreciation⁷⁰ and refraining from strictly specifying the parameters of the review mechanism, the Grand Chamber in *Vinter* is otherwise taking seriously the specification of the absolute right enshrined in Article 3.⁷¹ It puts human dignity on the table as a value underpinning Article 3 and the Convention more broadly – suggesting that ‘the very essence’ of the Convention system is ‘respect for human dignity’⁷² – and seeks to unpack dignity’s implications in the context of whole life sentences using comparative methodology and its own precedent. It is the emphasis on the dignity of all human beings that leads the Grand Chamber to establish the ultimate primacy of rehabilitation as a penological goal and to reject purely retributive imprisonment for life as incompatible with Article 3 – given its incompatibility with rehabilitation and thus with dignity.

⁶⁷ See *Kafkaris*, n 22 above, paras 104-105.

⁶⁸ *Vinter* [GC], n 1 above, para 110.

⁶⁹ I am grateful to Nicola Padfield and Jonathan Bild for alerting me to this potential implication of the Grand Chamber’s judgment.

⁷⁰ The margin of appreciation is a doctrine which is suited to the specification of qualified, not absolute, rights, as it allows leeway on the striking of the balance between the pursuit of a legitimate aim and the qualified right at issue. Letsas ties the margin of appreciation to the quality of ‘limitability’ of rights: G. Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 OJLS 705. See generally Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Intersentia, 2002). But see A. Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford: OUP, 2012), 204-210.

⁷¹ The significance of the specification of an absolute right, with particular focus on Article 3, is highlighted in Mavronicola, n 52 above.

⁷² *Vinter* [GC], n 1 above, para 113.

The Court's reasoning on dignity borrows, *inter alia*, from the FCC's interpretation of the untouchable constitutional right to dignity (Article 1(1) of the Grundgesetz) in the *Life Imprisonment* case. This is to be welcomed: the *Bundesverfassungsgericht* certainly takes dignity seriously – it is the supreme principle of the German constitution.⁷³ It can therefore be trusted to have invested painstaking consideration into its interpretation. Certainly, the Grand Chamber does not provide us with an exhaustive, clear-cut, definition of dignity, which is an admittedly complex and often elusive concept.⁷⁴ Yet it provides us with a concrete application of it, and one which is both persuasive and doctrinally coherent, in light of *Kafkaris*. Moreover, contrary to the arguments of Judge Villiger, the *ex ante*, rather than *ex post facto*, nature of the Court's analysis and findings is not only doctrinally apposite, as explained by Judge Mahoney, it is also in line with the cardinal importance of Article 3 as an absolute right under the Convention. Given the absolute nature of Article 3, it is commendable that the Grand Chamber is providing guidance through real rules on what is required under the right it enshrines, so that it may be respected rather than flouted.⁷⁵

Nonetheless, the Grand Chamber's guidance could be further clarified. As Judge Villiger pointed out, the Court did not draw out precisely why or how irreducible life sentences reach the Article 3 threshold of inhuman and/or degrading punishment. The Grand Chamber could have consolidated its analysis on dignity, rehabilitation, and retribution, and spelt out with more clarity that purely retributive irreducible sentences of life imprisonment amount to inhuman and/or degrading punishment because they deny human dignity in denying the possibility of rehabilitation and thus release and reintegration into society. Although I hope that my analysis demonstrates that this is what the Court's reasoning entails, it would certainly have been better if the Court itself had made it explicit. This last concern is not just an abstract point of conceptual coherence; more concretely, it is likely that domestic authorities – in the UK and beyond – will struggle to unpack the full implications of the judgment, for instance as regards those facing criminal sentencing when already at an advanced age. This 'unpacking' may well involve extensive litigation both domestically and in Strasbourg.

Beyond the significance of the above elements of the Court's reasoning, the judgment is likely to hold significant ramifications regarding extradition cases. In particular, many extradition requests from the United States often carry the prospect of discretionary or mandatory life sentences, as was the situation in cases such as *Harkins*⁷⁶ and *Babar Ahmad*⁷⁷ (the outcomes of which may appear problematic after this Grand Chamber judgment). Subject to some problematic dicta of the Fourth Section of the ECtHR in *Harkins* and *Babar Ahmad*, to the effect that what may be inhuman in ECHR States may not be inhuman outside

⁷³ See E. Benda, 'The Protection of Human Dignity (Article 1 of the Basic Law)' (2000) 53 SMU L Rev 443. Benda notes, at 449, that '[c]riminal law and criminal procedural law are major fields for the defense of human dignity'.

⁷⁴ For commentary on the multiple and varied meanings and implications of dignity, see C. McCrudden, 'Human dignity and judicial interpretation of human rights' (2008) 19 *European Journal of International Law* 655; D. Feldman, 'Human Dignity as a Legal Value: Part 1' [1999] *Public Law* 682. An overarching interpretation of dignity is offered by Dworkin in R. Dworkin, *Justice for Hedgehogs* (Cambridge, Massachusetts: Harvard University Press, 2011). Yet, although Dworkin elaborates through numerous examples, the analysis remains largely abstract given that, in the limited space of a book, Dworkin could not exhaust all the concrete applications of the principle of dignity.

⁷⁵ See Mavronicola, n 52 above, 739-743.

⁷⁶ See n 60 above.

⁷⁷ See n 60 above.

ECHR States,⁷⁸ the incompatibility of purely retributive whole life terms with Article 3 of the ECHR could operate to bar a number of extraditions to the US and elsewhere, under the *Chahal* and *Saadi* principles.⁷⁹

CONCLUSION

In 2010, Dirk Van Zyl-Smit suggested that the ECtHR was moving towards the recognition of ‘the fundamental dignity of all people’ in giving those serving life sentences ‘a fair prospect of release while they may still be able to play a role in society’, and predicted that it would develop its analysis in *Kafkaris* towards ‘the unambiguous outlawing of irreducible life sentences in the near future’.⁸⁰ The Grand Chamber of the ECtHR has done so in a judgment which affirms the prevailing significance of rehabilitation as a penological goal, and which rejects retribution as an adequate ground for locking an individual up for the duration of his or her lifetime. What the judgment does *not* do is allow the release of those facing life sentences after committing a serious crime while these individuals remain a danger to society. Thus *Vinter* embodies an appropriate affirmation and elaboration of the implications of Article 3 on whole life terms of imprisonment and is to be welcomed. At the same time, its full implications are likely to require further elucidation in the near future.

⁷⁸ *Harkins*, n 60 above, para 129; *Babar Ahmad*, n 60 above, para 177. See the critique of this reasoning in N. Mavronicola and F. Messineo, ‘Relatively Absolute? The undermining of Article 3 ECHR in *Ahmad v UK*’ (2013) 76 MLR 589.

⁷⁹ See *Chahal*, n 51 above, paras 79-80; *Saadi v Italy* App No 37201/06, Grand Chamber Judgment of 28 February 2008, paras 127, 138-139.

⁸⁰ D. Van Zyl-Smit, ‘Outlawing Irreducible Life Sentences: Europe on the Brink?’ (2010) 23 *Federal Sentencing Reporter* 39, 46. Similar prophetic words can be found in the Court of Appeal judgment in *Bieber*, n 44 above, [46]. See further D. Van Zyl-Smit, *Taking Life Imprisonment Seriously in National and International Law* (The Hague: Kluwer, 2002).